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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/784,645	02/23/2004	Joseph P. Errico	SPINE 3.0-437 CPCPCPCPCPC	8190
51640	7590	01/09/2008	EXAMINER	
SPINE MP LERNER, DAVID, et al. 600 SOUTH AVENUE WEST WESTFIELD, NJ 07090			PELLEGRINO, BRIAN E	
			ART UNIT	PAPER NUMBER
			3738	
			MAIL DATE	DELIVERY MODE
			01/09/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/784,645

Applicant(s)

ERRICO ET AL.

Examiner

Brian E. Pellegrino

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 15 October 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 14-16 and 18-20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 14-16 is/are rejected.
- 7) ☒ Claim(s) 18-20 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 15 October 2007 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Terminal Disclaimer

The terminal disclaimer filed on 10/15/07 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of US 7235081 and application 10/784628 has been reviewed and is accepted. The terminal disclaimer has been recorded.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 14,16 are rejected under 35 U.S.C. 102(e) as being anticipated by Davis et al. (6527786). Fig. 27 shows an instrument with a shaft **58**, a pin **28** having an end bent downward and a spring **87** located internal and biased to hold the pin on the shaft. It can also be seen (Fig. 28) that the distal end of the pin abuts the confronting surface of the shaft and there is an extension **91** that has a lower or inner surface that prevents the pin from upward movement. Fig. 34 shows how the extension extend out of the shaft and have a perpendicular confronting surface. Please note the intended use, as

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set forth in the claims, carries no weight in the absence of any distinguishing structure. Clearly, the device is capable of manipulating an orthopedic device. The pin clearly moves in a longitudinal direction relative to the shaft.

Claim 14 is rejected under 35 U.S.C. 102(e) as being anticipated by Fraser et al. (6755841). Fraser et al. show (Fig. 3A) apparatus to manipulate an orthopedic implant with the apparatus having a shaft resulting from two levers 12c, 14c and providing a channel or space for spring 2. At the end of the apparatus is a pin 12cC or 14cC that can be bent downward depending on how the apparatus is positioned, col. 6, lines 34-36. The Examiner is interpreting the pins to be retractable and extendible since they can be maneuvered in and out the working space by the surgeon. The Examiner also interprets the spring to be indirectly coupled to the pins since they are connected via the pusher block or extension 18c that is perpendicular to the axis of the apparatus that has the pins inserted therein. Additionally since the extension fixedly connects the levers of the shaft it can be said its lower surface prevents the pins from moving.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Fraser et al. '841 in view of Baccelli et al. (2003/28249). Fraser et al. is explained above. However, Fraser fails to teach the pins at the end engage a hole of a orthopedic device baseplate. Fraser does teach a pin can engage a hole in a spinal device, Fig. 16.

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Baccelli et al. teach that a pin at the end of a spinal manipulating tool is to engage a hole in an orthopedic or spinal implant. This is to keep it from moving laterally. It would have been obvious to one of ordinary skill in the art to use the pin end of Fraser to insert in a hole of a spinal device as taught by Baccelli et al. when manipulating a spinal device that was inserted in the space and the surgeon is repositioning the implant with the pin end.

Response to Arguments

Applicant's arguments with respect to claims 14-16, 18-20 have been considered but are moot in view of the new ground(s) of rejection.

Allowable Subject Matter

Claims 18-20 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not

mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian E. Pellegrino whose telephone number is 571-272-4756. The examiner can normally be reached on Monday-Friday from 8am to 5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott, can be reached on 571-272-4754. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

TC 3700, AU 3738

BRIAN E. PELLEGRINO
PRIMARY EXAMINER
Brian Pellegrino